

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SANDRA RICE)	
Claimant)	
VS.)	
)	Docket No. 163,517 & 165,668
GOLDEN ACRES NURSING HOME)	
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

ON the 10th day of February, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge James R. Ward on December 16, 1993, and the Award Nunc Pro Tunc entered by Administrative Law Judge James R. Ward on January 7, 1994, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, James E. Martin of Overland Park, Kansas. The respondent and its insurance carrier appeared by and through its attorney, Bret C. Owen of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Thomas D. Haney of Topeka, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the December 16, 1993 Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as set forth in the December 16, 1993 Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's disability?
- (2) What is claimant's average weekly wage from the injury of May 2, 1992?
- (3) Did claimant experience an underpayment of temporary total from the May 2, 1992 injury and if so is she entitled to additional temporary total therefrom?
- (4) Is claimant entitled to future medical treatment?
- (5) Is the Kansas Workers Compensation Fund entitled to a credit for the injury of May 2, 1992 under K.S.A. 44-510a?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulation of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant, as a result of the injury of December 12, 1990, has experienced a 28.5 percent (28.5%) work disability. As a result of the May 1, 1992 date of injury claimant has suffered no additional work disability and is entitled only to temporary total disability and medical compensation therefrom.

Claimant, a 45-year old who did not complete high school but who after obtained GED and a CNA degree, began working for the respondent as a CNA in October 1990. On December 12, 1990, while attempting to hold a patient who was falling, the claimant experienced a pop in her neck and shoulders resulting in immediate pain. The injury was reported to her supervisor and she was referred to medical treatment with Dr. Burt, Dr. Walsh, Dr. Payne, and ultimately Dr. Arjunan, a neurosurgeon who performed surgery at the C5-6 level on August 2, 1991. After going through physical therapy and work hardening claimant returned to work as a CNA for the respondent in an accommodated position on May 1, 1992. Claimant's return to work involved restrictions of no lifting over 25 to 30 pounds maximum, no pushing or pulling with the arms, no repetitive bending or twisting of the neck, and no work with the arms above shoulder level.

On May 2, 1992 claimant suffered an aggravation of a preexisting condition when her hair was pulled by a resident causing immediate pain in her neck and shoulders. She again sought medical care and was again referred to Dr. Arjunan. Claimant was again returned to work by Dr. Arjunan with specific restrictions were accommodated by the respondent from August 17, 1992 to September 5, 1992. On or about September 5, 1992 claimant was diagnosed as having a foot and lower extremity problem, possibly arthritis, which was not work related. As a result of this condition claimant was unable to walk and left her employment with the respondent. Due to the ongoing foot and leg problems, which are not related to her work, claimant has been unable to return to work.

Claimant was examined on two occasions by Dr. Revis Lewis, a board certified neurosurgeon. Dr. Lewis rated claimant at 25 percent (25%) to the body as a whole and restricted her to a maximum lift of 20 to 25 pounds with no work above shoulder level and further cautioned that claimant avoid repetitive movement of the neck and no work with the neck in awkward positions. He also discussed the need for future medical care. Dr. Lewis felt the claimant suffered a one to two percent (1-2%) increase in functional impairment as a result of the May 1992 hair-pulling incident. A portion of Dr. Lewis' rating, i.e, eight percent (8%), stems from speculation on the doctor's part that claimant may need surgery in the future although none was recommended at the time of his examination.

Dr. K.N. Arjunan, a board certified neurosurgeon who performed the surgery on the claimant subsequent to her 1990 injury, returned claimant to work with a 30 pound permanent lifting restriction and recommended that claimant avoid direct patient contact. Dr. Arjunan felt the May 1992 injury temporarily aggravated her neck and shoulder condition but that the incident caused no increase in her permanent functional impairment.

Claimant was examined and treated by Dr. Eric Hansen, a physiatrist, from January 21, 1992 through April 1, 1992. Dr. Hansen rated claimant at 14 percent (14%) to the body as a whole on a functional basis and felt she should be restricted from frequent left shoulder motion and frequent flexion and abduction of the shoulder above 90 degrees. He also restricted claimant's maximum lift to 25 pounds. He felt the claimant was capable of returning to work for the respondent in the modified job provided. Dr. Hansen did not have the opportunity to examine the claimant subsequent to the May 1992 injury

but in his deposition he did give more credence to the opinion of Dr. Arjunan as the treating physician, than to an examining physician.

The claimant was examined by Jeffrey G. Simmons, the Director of Vocational Evaluation Services for Menninger Return to Work Center in Topeka, Kansas. Mr. Simmons opined claimant had lost 57 percent (57%) of her ability to perform work in the open labor market but had suffered no wage loss as claimant was capable of returning to work at a comparable wage at an accommodated position with the respondent.

The respondent also took the deposition of Ms. Jean Cordell, the office manager and bookkeeper for the respondent. Ms. Cordell testified that the claimant had been returned to work part-time per the agreement between her and the respondent subsequent to the 1990 injury. Subsequent to the May 1992 injury claimant also returned to work part-time working from 21 to 52 hours per two-week pay period. During the 26 weeks prior to claimant's May 2, 1992 injury she earned \$1,340.93. During this period of time she actually worked 16.17 weeks out of the 26-week period. This equates to an average weekly wage of \$82.93, and a temporary total disability compensation rate of \$55.29 per week.

K.S.A. 44-501(a) states in part:

"If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true," on the basis of the whole record.

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all the various conditions upon which her right to it depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

While it is conceded that claimant returned to work for the respondent after both injuries at a comparable hourly rate, it is also clear that the claimant's return to work on both occasions was to part-time rather than full-time employment. As such, the Appeals Board finds the presumption of K.S.A. 1992 Supp. 44-510e(a) does not apply and the employee is entitled to a work disability in this matter.

The doctors who testified in this matter opined claimant was capable of returning to work although with significant restrictions in not only the amount of weight claimant could lift but also as to the physical activities claimant could undertake without risk of re-injury.

Jeffrey G. Simmons, the vocational rehabilitation expert hired to assess claimant's ability to perform work in the open labor market and earn a comparable wage found claimant's labor market access loss to be 57 percent (57%) due to the restrictions under which claimant was returned to her employment. He did feel claimant's ability to return to work at a comparable wage had not been reduced as claimant was capable of earning the same wage for the respondent as she had been earning prior to the injury.

The test for determining permanent partial general disability is the extent, expressed as a percentage, to which the claimant's ability to perform work in the open labor market has been reduced and the ability of the worker to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). While Hughes does not mandate the use of a specific formula to arrive at the exact percent of disability it does require consideration of the two factors stated above when computing the extent of permanent partial disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

The trier of facts' function is to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212 (1991).

The Appeals Board, as the trier of fact, has the ultimate decision concerning the extent and nature of disability and such decision must be based upon evidence presented in the record. The Appeals Board finds that the opinion of Jeffrey G. Simmons is supported by the credible evidence and further finds that said opinion is uncontradicted, not found to be improbable or unreasonable and will not be disregarded as it has not been shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

In order to arrive at a percentage, a mathematical equation or formula must necessarily be utilized. Hughes, supra at 422. While the statute is silent as to how the percentage is to be arrived at, the Appeals Board in this matter elects to adopt the formula set forth in Hughes, supra. In averaging the 57 percent (57%) loss of labor market access with the zero percent (0%) loss of ability to earn a comparable wage, the Appeals Board finds the claimant has suffered a 28.5 percent (28.5%) permanent partial disability to the

body as a whole from the December 12, 1990 injury. The Appeals Board further finds that claimant sustained no additional permanent partial impairment as a result of the injury suffered on May 2, 1992.

(2) Claimant's average weekly wage stemming from the injury of May 2, 1992 is found to be \$82.93 per week.

(3) The Appeals Board finds that claimant was paid temporary total for 13.69 weeks at the rate of \$55.29 per week from and after the injury of May 2, 1992. Taking into consideration the average weekly wage finding above, the Appeals Board finds claimant suffered no underpayment of temporary total disability as a result of the May 2, 1992 injury.

(4) The Appeals Board further finds that claimant is entitled to future medical upon application to and approval by the Director.

(5) It has been stipulated that the Kansas Workers Compensation Fund is liable for 75 percent (75%) of the temporary total disability compensation and medical expenses paid in connection with the May 2, 1992 accidental injury. As no increase in claimant's functional impairment or work disability was found as a result of the May 2, 1992 injury, and no award is being paid as a result of that injury, the issue of credit under K.S.A. 44-510a does not need to be addressed.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that claimant shall be awarded compensation for the injuries suffered on December 20, 1990, and that claimant is entitled to a 28.5 percent (28.5%) permanent partial disability to the body as a whole therefrom. Claimant is awarded 52.29 weeks of temporary total disability compensation at the rate of \$126.67 per week in the sum of \$6,623.57 followed by 13.57 weeks of temporary partial disability at the rate of \$90.31 per week in the sum of \$1,225.51 followed by 349.14 weeks of compensation at the rate of \$36.10 per week totalling \$12,603.95 for a 28.5 percent (28.5%) permanent partial disability to the body as a whole for the accidental injury of December 12, 1990, making a total award of \$20,453.03.

As of February 16, 1994, there would be due and owing to the claimant 52.29 weeks of temporary total disability at the rate of \$126.67 per week totalling \$6,623.57 plus 13.57 weeks of temporary partial disability compensation at the rate of \$90.31 per week totalling \$1,225.51, plus an additional 100.28 weeks of compensation at the rate of \$36.10 per week in the sum of \$3,620.11 less compensation heretofore paid, payable in one lump sum. Thereafter, the balance of compensation at the rate of \$36.10 per week for 248.86 weeks totalling \$8,983.84 shall be payable until fully paid or until otherwise ordered by the Director.

The Appeals Board further finds that claimant is entitled to 13.69 weeks of temporary total disability compensation at the rate of \$55.29 per week totalling \$756.92 for the accidental injury of May 2, 1992, making a total award of \$756.92, all of which has

heretofore been paid.

The Appeals Board further finds that claimant is entitled to future medical treatment upon application to and approval by the Director.

The Appeals Board further finds that the Kansas Workers Compensation Fund is due no credit for the injury of December 20, 1990, as no permanent partial disability compensation was awarded for the accidental injury of May 2, 1992.

The Appeals Board further finds the Kansas Workers Compensation Fund is liable for 75 percent (75%) of all temporary total compensation and medical expenses paid in connection with the May 2, 1992 accidental injury and further finds that the Kansas Workers Compensation Fund reimburse to the respondent and its insurance carrier, National Union Fire Insurance Company, the sum of \$3,774.93 in temporary total disability compensation and medical expenses for the accidental injury of May 2, 1992.

Fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid as follows:

REBECCA J. RAMSAY, RPR	\$ 593.20
BRAKSICK REPORTING SERVICE	\$ 260.40
APPINO & ACHTEN REPORTING SERVICE	\$ 680.15

IT IS SO ORDERED.

Dated this _____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: James E. Martin, 7101 College Blvd, Suite 200, Overland Park, Kansas 66210
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George Gomez, Director